

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

MICHELLE Y. MILLER-SMITH,

Debtor.

Case No. **04-61991-13**

MEMORANDUM OF DECISION

At Butte in said District this 12th day of August, 2005.

Pending in this Chapter 13 bankruptcy case is the motion to modify stay filed June 15, 2005, by secured creditor the United States, Rural Housing Service (hereinafter referred to as the “Rural Housing Service”), and Debtor’s objection thereto. The Chapter 13 Trustee filed a consent to the Rural Housing Service’s motion on June 20, 2005. After due notice, hearing on the Rural Housing Service’s motion was held at Missoula on July 7, 2005. The Debtor Michelle Miller-Smith (“Michelle”) appeared and testified, represented by attorney Harold V. Dye (“Dye”). The Rural Housing Service was represented by assistant U.S. Attorney George F. Darragh Jr. (“Darragh”), and called to testify Christine L. VanRonk (“VanRonk”), Area Director for the USDA Rural Development. Exhibits (“Ex.”) 501, 502, 503, and 504, and Debtor’s Ex. 1, all were admitted into evidence without objection. At the conclusion of the parties’ cases-in-chief the Court took the matter under advisement. After review of the record and applicable law, this matter is ready for decision. This memorandum contains this Court’s findings of fact and conclusions of law.

This Court has exclusive jurisdiction in this Chapter 13 case under 28 U.S.C. § 1334(a). The Rural Housing Service's motion to modify stay is a core proceeding under 28 U.S.C. § 157(b)(2). For the reasons set forth below, Debtor's objection will be overruled and the Rural Housing Service's motion to modify stay will be granted by separate Order, but the Debtor will be allowed thirty (30) days to complete her application for a reduction in payments and file a written stipulation with the Rural Housing Service to cure her post-petition default.

FACTS

Michelle is indebted to Rural Housing Service under a promissory note, Ex. 500, dated June 7, 2000, in the principal amount of \$66,000. The note requires monthly payments in the amount of \$444.95, and is secured by a mortgage on her residence. Ex. 501¹.

Michelle filed a voluntary Chapter 13 petition on June 25, 2004, and filed her Schedules, Statements and Chapter 13 Plan on July 12, 2004. Schedule D lists USDA Rural Development as a creditor with a claim in the amount of \$66,000.00 secured by a second lien on her residence valued at \$130,000. Debtor's Plan provides for curing an arrearage to USDA Rural Development in the amount of \$4,100.00.

On February 16, 2005, Rural Housing Service sent Michelle Ex. 1, a letter advising her of the availability of payment adjustment if she experiences a change in income, along with other correspondence and requested information.

Rural Housing Service filed its motion to modify stay on June 15, 2005, alleging the Debtor is in default of ten (10) monthly post-petition payments totaling \$4,449.50. VanRonk testified that she is familiar with the Debtor's loan history, and that the Debtor has made no

¹Ex. 501 describes Michelle's residence as at Lot 5, Block 3, West View, according to the official plat thereof, as filed in the Clerk and Recorder's Office, Missoula County, Montana.

mortgage payments since she filed her petition. The Debtor confirmed that she has not made any mortgage payments since her petition date. Under questioning by the Court she testified she owes 13 mortgage payments. The July 2005 mortgage payment was due on the date of the hearing, and now the August payment is due and owing.

Michelle testified that she has not made any mortgage payments because she received notice from USDA Rural Development that she may be eligible for lower payments. She testified that she telephoned USDA Rural Development and asked whether she should continue to make her regular monthly payments while applying for lower payments, and she was told not to. However, the Debtor could not provide any written evidence that USDA Rural Development told her not to make her regular payments, and could not recall the name of the person from USDA Rural Development who told her not to send in her regular payments. VanRonk testified that applicable regulations do not permit the foregoing of regular payments pending an application for mortgage payment reduction, and that the Debtor's regular mortgage payments were and remain due and owing.

Darragh advised the Court that Rural Housing Service will aid the Debtor in submitting her application for an adjustment in her payment, but that the application is subject to approval by the St. Louis office.

DISCUSSION

Rural Housing Service's motion to modify stay is filed pursuant to 11 U.S.C. § 362(d)(1) and (d)(2), based upon the Debtor's default in monthly payments under her note and mortgage. The evidence is uncontroverted that the Debtor is in default of at least 13 post-petition monthly payments.

Under 11 U.S.C. § 362(g), a creditor has the burden of proving that a debtor does not

have equity in property, while the debtor has the burden of proof on all other issues to show that the stay should not be modified, including adequate protection. *See First Interstate Bank of Billings v. Interstate Distrib. Co., Inc. (In re Interstate Distributing Co., Inc.)*, 13 Mont. B.R. 86, 89 (D. Mont. 1993) (recognizing that the burden of proof on the issue of adequate protection is on the debtor); *In re Mittlestadt*, 20 Mont. B.R. 46, 52 (Bankr. D. Mont. 2002); *In re Hungerford*, 19 Mont. B.R. 103, 133-34 (Bankr. D. Mont. 2001); *In re National Environmental Waste Corp.*, 191 B.R. 832, 836 (Bankr. C.D. Cal. 1996), *aff'd*, 129 F.3d 1052 (9th Cir. 1997); *In re Syed*, 238 B.R. 126, 132 (Bankr. N.D. Ill. 1999); *In re Sauk Steel Co., Inc.*, 133 B.R. 431, 436 (Bankr.N.D.Ill.1991); 11 U.S.C. § 362(g)(2). Thus, the burden of proof in this § 362(d)(1) contested matter is on the Debtor to show that the Rural Housing Service's motion to modify stay should not be granted.

A. Contentions of the Parties.

The Rural Housing Service seeks relief from the stay to allow the Rural Housing Service to proceed with foreclosure of its mortgage on the Debtor's residence because of the post-petition default. The Chapter 13 Trustee consented to the Rural Housing Service's motion.

Debtor objects on the grounds Rural Housing Service offered to reduce her mortgage payment, and that someone from Rural Housing Service told her not to send in her regular payment while her application for payment reduction was pending.

B. Section 362(d)(1).

Under 11 U.S.C. § 362(a), "[a] bankruptcy filing imposes an automatic stay of all litigation against the debtor." *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1166 (9th Cir. 1990) (citing 11 U.S.C. § 362(a)), except in those cases specifically enumerated in § 362(b). The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives debtors a breathing spell from creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits debtors to attempt a repayment

or reorganization plan, or simply to be relieved of the financial pressures that drove them into bankruptcy. S.Rep. No. 989, 95th Cong., 2d Sess. 54-55 (1978), *reprinted in* 1978 U.S.Code Cong. & Admin.News 5787, 5840-41.

In re Mittlestadt, 20 Mont. B.R. at 51 (quoting *In re Westco Energy, Inc.*, 18 Mont. B.R. 199, 211-12 (Bankr. D. Mont. 2000)).

Rural Housing Service's motion for relief from the stay is based in part upon § 362(d)(1), which allows for the granting of relief from the automatic stay "for cause, including the lack of adequate protection of an interest in property of such party in interest[.]" This Court explained the standard for modifying the stay for "cause" under § 362(d)(1) in *Westco*:

Section 362(d), however, provides that, "[on request of a party in interest and after notice and a hearing, the court shall grant relief from the [automatic] stay" in three instances. The subsection relevant to these proceedings is § 362(d)(1), which allows for the granting of relief from the automatic stay "for cause".² What constitutes cause for purposes of § 362(d) "has no clear definition and is determined on a case-by-case basis." *Tucson Estates*, 912 F.2d at 1166. *See also Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (In the Matter of Little Creek Dev. Co.)*, 779 F.2d 1068, 1072 (5th Cir. 1986) (Relief from the automatic stay may "be granted 'for cause,' a term not defined in the statute so as to afford flexibility to the bankruptcy courts.").

Westco, 18 Mont. B.R. at 211-12.

Section 362 vests this Court with wide latitude in granting appropriate relief from the automatic stay, and a decision to lift the automatic stay is within a bankruptcy court's discretion, and subject to review for an abuse of discretion. *In re Delaney-Morin*, 304 B.R. 365, 369-70 (9th

² Section 362(d)(1) provides:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section , such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest[.]

Cir. BAP 2003); *In re Leisure Corp.*, 234 B.R. 916, 920 (9th Cir. BAP 1999); *In re Plummer*, 20 Mont. B.R. 468, 477-78 (Bankr. D. Mont. 2003); *Mataya v. Kissinger (In re Kissinger)*, 72 F.3d 107, 108-109 (9th Cir. 1995).

Lack of adequate protection is but one example of cause for relief from stay. *In re Ellis*, 60 B.R. 432, 435 (9th Cir. BAP 1985); *In re Avila*, 311 B.R. 81, 83 (Bankr. N.D. Cal. 2004). An equity cushion may provide adequate protection even though not a single mortgage payment has been made. *Avila*, 311 B.R. at 83; *In re Mellor*, 734 F.2d 1396, 1400 (9th Cir.1984). In *Avila* the court found the mortgagee was adequately protected by an equity cushion of 40%. 311 B.R. at 83. The court noted that “[w]here a creditor is adequately protected by a large equity cushion, the debtor would suffer a substantial loss in the event of foreclosure, and no economic harm to the creditor would result, relief from stay should not automatically follow a default in payment.” *Avila*, 311 B.R. at 84; *see In re McCollum*, 76 B.R. 797, 799 (Bankr. D. Or.1987).

Applying the above law to the instant case, the Court notes that Rural Housing Service is protected by a significant equity cushion. On the other hand, the Court finds that the Debtor’s admitted post-petition default in mortgage payments, which numbered at least 13 at the time of trial, constitutes cause to modify the stay notwithstanding the equity cushion.

The Court gives little probative weight to Debtor’s testimony that some unidentified employee of Rural Housing Service told her not to make her regular payments while her application for a reduction in payments is pending. The Debtor produced nothing in writing to corroborate her testimony, and could not identify who at Rural Housing Service told her not to make her payments. VanRonk testified that the applicable regulations did not allow foregoing payments while an application is pending, and the Debtor offered no evidence to the contrary.

Based upon the evidence and the magnitude of Debtor’s admitted post-petition default,

the Court finds and concludes that the Debtor failed to satisfy her burden of proof under § 362(d)(1) to show that Rural Housing Service's motion for relief from the stay should not be granted. The Debtor has burdens under the Bankruptcy Code which are necessary for her to satisfy in order to enjoy its benefits such as the automatic stay. In the Court's view, Debtor's lengthy post-petition default and failure to promptly submit her paperwork to USDA Rural Development reflects a failure to carry her burdens to continue to enjoy the benefits of the automatic stay.

Granting relief from the automatic stay returns the parties to the legal position which they enjoyed prior to the imposition of the stay. *In re Johnson*, 17 Mont. B.R. 318, 319 (Bankr. D. Mont. 1999); *Estate of B.J. McAdams v. Ralston Purina Co.*, 154 B.R. 809, 812 (N.D. Ga. 1993).

Thus, while the Court has flexibility in determining whether to grant the Rural Housing Service's motion for relief from the stay, by granting the motion Debtor retains whatever claims, defenses and remedies she may have against the Rural Housing Service in this or a nonbankruptcy forum, including the right to complete and submit her application for a reduction in payments, which Darragh represented on the record Rural Housing Service would aid her in doing. In the interests of justice the Court will stay the effective date of relief for a period of thirty (30) days to allow the Debtor the opportunity to complete and submit her application for a reduction in payment, and to file a written stipulation with Rural Housing Service to cure her post-petition default, and will direct Rural Housing Service to cooperate with and aid the Debtor in submitting her application as represented by Darragh at the hearing.

For the reasons set forth above, because Debtor failed to satisfy her burden of proof to show that relief from the stay should not be granted, this Court exercises its broad discretion and grants the Rural Housing Service's motion to modify stay. *Mataya v. Kissinger*, 72 F.3d at 108-

CONCLUSIONS OF LAW

1. This Court has original and exclusive jurisdiction over this Chapter 11 bankruptcy case under 28 U.S.C. § 1334(a).
2. The motion to modify stay filed by Rural Housing Service is a core proceeding under 28 U.S.C. § 157(b)(2)(G).
3. The Debtor failed to satisfy her burden of proof under 11 U.S.C. §§ 362(d)(1) & (g)(2) to show that relief from the automatic stay should not be granted.

IT IS ORDERED a separate Order shall be entered overruling the Debtor's objection filed June 20, 2005, granting the Rural Housing Service's motion to modify stay filed June 15, 2005, and authorizing the Rural Housing Service to seek foreclosure and liquidation of its collateral described as Lot 5, Block 3, West View, according to the official plat thereof, as filed in the Clerk and Recorder's Office, Missoula County, Montana, in accordance with applicable nonbankruptcy law and the terms of the Rural Housing Service's motion, but staying the effective date of the relief granted for a period of thirty (30) days in order that the Debtor may complete negotiations and paperwork application to reduce her monthly payments and cure her default, and directing Rural Housing Service to cooperate with the Debtor and expedite her application.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana